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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 450

POLICE COMMISSIONER OF BALTIMORE CITY
AND
STATE'S ATTORNEY FOR BALTIMORE CITY,
Petitioners,

VS.

SIEGEL ENTERPRISES, INC. T/A SIEGEL BOOK AND MAGAZINE STORE AND CHARLES BOOK CENTER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI

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JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on July 1, 1960, and is printed in Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3), since the validity of a State statute on the grounds of repugnancy to the Constitution of the United States is drawn in question.

The Court of Appeals of Maryland affirmed an Order of the Superior Court of Baltimore City (Reuben Oppenheimer, Judge) declaring Section 421 (a) (b) and (d) of Article 27 of the Annotated Code of Maryland (1957 Ed. and 1960 Supp.) unconstitutional and void and enjoining the petitioners from enforcing said section. The Court of Appeals of Maryland, in their opinion, stated that they were applying the rule in regard to the definiteness required in criminal statutes as laid down by the Supreme Court of the United States, thus basing the affirming opinion on the cases as decided by this Honorable Court.

QUESTIONS PRESENTED

1. Whether this Honorable Court should re-examine and reconsider the decision of this Court in *Winters v. New York*, 333 U.S. 507, 92 L. Ed. 840, 68 S. Ct. 665?

2. Are sub-sections (a), (b) and (d) of Section 421 of Article 27, Annotated Code of Maryland (1957 Ed. and 1960 Supp.) constitutional?

STATUTES INVOLVED

The provisions of Sections 421, 423 and 425 of Article 27 of the Annotated Code of Maryland (1957 Ed. and 1960 Supp.) are set forth in Appendix A of this petition. Articles 23 and 40 of the Declaration of Rights are also set forth in Appendix A.

STATEMENT

On May 28, 1959, a petition for declaratory judgment and claim for injunction was filed by the Respondents alleging that sub-sections (a) (b) and (d) of Section 421 of Article 27 of the Annotated Code of Maryland (often referred to as the Crime Comic Book Act) were unconstitutional and requesting the Court to so declare and enjoin the Petitioners from enforcing said Act.

After a hearing, Judge Oppenheimer filed an opinion on January 19, 1960 finding that the Act was unconstitutional and an Order to that effect was signed on January 27, 1960. An appeal was filed by the Petitioners on January 28, 1960, and on July 1, 1960, the Court of Appeals of Maryland affirmed the decree. The Petitioners are now requesting this Honorable Court to issue a Writ of Certiorari to the Court of Appeals of Maryland in order that this Honorable Court may decide the very important questions presented.

The Court, in finding that the statutes involved were unconstitutional, primarily based such unconstitutionality on the case of *Winters v. New York*, 333 U.S. 507, 92 L. Ed. 840, 68 S. Ct. 665.

REASONS FOR GRANTING THE WRIT

The Maryland Court of Appeals based their opinion primarily on the case of *Winters v. New York*, 333 U.S. 507, 92 L. Ed. 840, 68 S. Ct. 665. This petition is filed to respectfully request this Honorable Court to re-examine and reconsider that decision in light of the conditions as they exist today. Since the *Winters* decision was pronounced in 1948 the distribution of the amount of material which that New York law was passed to control has increased each year until now it is one of the most important prob-

lems the cities, states and the country are now faced with, especially in regard to m[illegible]ors.

The Maryland General Assembly found, before passing the law which is before this Honorable Court in this petition, that in recent years there had been a serious and tremendous increase in Maryland in the number and variety of comic books of the types and kinds prohibited by law before this Court. The General Assembly also found that children below the age of eighteen years, being of susceptible and impressionable character, were or could be incited to commit certain crimes, in good part through the influence of these vicious and corrupt publications and that great numbers of these books were deliberately calculated to horrify and excite unreasonable terror in the impressionable minds of children. The General Assembly also found that the persons publishing and distributing these books do so with full knowledge and intent that the books will be sold to children and a substantial portion of the market for such books is children.

The changes which have occurred since the *Winters* case point up the need for its re-examination and reconsideration by this Court. It is established beyond doubt that the states have the power to restrict, prohibit or regulate obscenity and that statutes passed for this purpose are not in conflict with nor in contravention of the First or Fourteenth Amendment to the Constitution of the United States. See 16 C.J.S. 923, Section 186, and cases cited. *Roth v. United States*, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304; *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 1 L. Ed. 2d 1469, 77 S. Ct. 1325. See also *Beauharnais v. Illinois*, 343 U.S. 250, 96 L. Ed. 919, 72 S. Ct. 725; *Winters v. New York*, 333 U.S. 507, 92 L. Ed. 840, 68 S. Ct. 665; *Chaplinsky v. New Hampshire*, 315 U.S. 568, 86 L. Ed. 1031, 62 S. Ct. 766;

Near v. Minnesota, 283 U.S. 697, 75 L. Ed. 1357, 51 S. Ct. 625.

Obscenity statutes are not an invasion of, but a legitimate exception to the rights of free speech and of the press as guaranteed by the First Amendment.

In *Roth v. United States*, supra, this Court held that obscenity is not within the area of constitutionality protected speech or press, that is, that obscene literature does not necessarily involve any violation of the guarantee of free speech and press, protected from Federal infringement by the First Amendment and from State infringement by the Fourteenth Amendment. The Court said that in the light of history the unconditional phrasing of the First Amendment was not intended to protect every utterance and that the rejection of obscenity as utterly without redeeming social importance is implicit in the history of the First Amendment. Mr. Justice Brennan, speaking for the Court in the *Roth* case, said at page 1507 of 1 L. Ed. 2d:

> "* * * This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. This is the same judgment expressed by this Court in Chaplinsky v. New Hampshire, 315 U.S. 568, 571, 572, 86 L. Ed. 1031, 1035, 62 S. Ct. 766:
>
> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene * * * It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly

outweighed by the social interest in order and morality * * *".

This Court then held that obscenity was not within the area of constitutionally protected speech or press. The *Roth* case was the first time that the Court had squarely decided whether obscenity was an utterance within the area of protected speech and press.

One of the statutes involved in the *Roth* case was a California statute providing that whoever wilfully and lewdly writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent publication, or writes, composes, or publishes any notices or advertisements of any such publication is guilty of a misdemeanor. The Court, in upholdng the statute, indicated that a deprivation of free speech would occur if, in applying the statute, the trial court judged the publication by the effect of isolated passages rather than following the proper standard that to the average person under contemporary community standards, the dominant theme of the material, when taken as a whole, appealed to prurient interest. The Court ruled further that the statute involved no violation of due process by failing to provide a reasonably ascertainable standard of guilt since the statutory language, applied according to proper standards for judging obscenity, gave adequate warning of the conduct which was prohibited and marked the boundaries so that judges and juries could fairly administer the law.

The other statute, in the *Roth* case, which the Supreme Court held to be constitutional was the Federal obscenity statute which makes punishable the mailing of material that is "obscene, lewd, lascivious, or filthy * * * or other publication of an indecent character."

The statutes in the instant case exemplify a voluntary exercise of the police power of the state which does not encroach on any rights of the Respondent under the Constitutions of the United States or Maryland. In enacting the Crime Comic Book Act, the Maryland General Assembly found and determined as set forth in Section 420 of the Act:

> "The General Assembly of Maryland finds and determines that in recent years there has been a serious and tremendous increase in Maryland in the number and variety of comic books of the types and kinds prohibited by this subheading, dealing in substantial part with crimes and that many of such crime comic books are designed and formed so as to resemble closely other books devoted in substance to matters of humor published primarily for sale to children, being often placed for sale side by side with the humorous publications. The General Assembly also finds and determines that children below the age of eighteen years, being of susceptible and impressionable character, are or may be incited to commit certain crimes, in good part through the influence of these vicious and corrupt publications, and that great numbers of these books are deliberately calculated to horrify and excite reasonable terror in the impressionable minds of children, and do or may produce such results. The General Assembly further finds that the persons publishing and distributing these books do so with the full knowledge and intent that the same may be sold to children under the age of eighteen and further finds that a major and substantial portion of the market for such crime books is composed of children under the age of eighteen years and that such books are intended for such market." (Section 420, Article 27, Annotated Code of Maryland (1957 Edition)).

The Respondent in this case alleged that sub-sections (a) and (b) of Section 421 of Article 27, Annotated Code of

Maryland (1960 Supplement) were vague and indefinite and, therefore, did not provide reasonably ascertainable standards of guilt, a violation of the constitutional requirements of due process.

Sub-section (a) of Section 421 makes it unlawful for any person operating any newstand, etc. to wilfully sell or distribute to any child below the age of eighteen years; or to permit the perusal of by any such child; or to have possession of with intent to sell to such children of

> "* * * any book, pamphlet, magazine or other printed paper principally composed of pictures and specifically including but not limited to comic books, devoted to the publication and exploitation of actual or fictional deeds of violent bloodshed, lust or immorality, or which, for a child below the age of eighteen years, are obscene, lewd, lascivious, filthy, indecent or disgusting and so presented as reasonably to tend to incite a child below the age of eighteen years to violence or depraved or immoral acts against the person."

Sub-section (a) therefore prohibits two types of materials to be sold to or to be perused by or held with the intent to sell to children under the age of eighteen years. First, those devoted to the publication and exploitation of actual or fictional deeds of violence and bloodshed, lust or immorality and so presented as reasonably to tend to incite a child below the age of eighteen years to violence or depraved or immoral acts against the person, and Second, those materials which, for a child below the age of eighteen years, are obscene, lewd, lascivious, filthy, indecent or disgusting and so presented as reasonably to tend to incite a child below the age of eighteen years to violence or depraved or immoral acts against the person.

The Constitution of the United States, has endured since its adoption and among those rights which it guarantees to

the people of this country is freedom of speech and press, however it was never intended to protect forces which may destroy domestic tranquility and the general welfare. The Constitution was not meant to allow the publication and distribution to children of materials which may reasonably tend to incite a child to immoral or violent acts against the person.

Fundamental fairness of course requires that persons be given notice of what they are expected to avoid. If the Legislature fails in this regard the statute is indefinite and unconstitutional as a violation of "due process of law." But as Mr. Justice Frankfurter stated in his dissenting opinion in *Winters v. New York*, 333 U.S. 507, 524, "indefiniteness" is not a quantitative concept. It is not even a technical concept of definite components. It is itself an indefinite concept.

The requirement is that fair notice be given that such conduct may result in punishment, however whether it is fair notice depends upon the subject matter involved. We submit that the statute in question is constitutional as it does give fair warning and furnishes an adequate standard of guilt.

The Legislature has found that the prohibited publications may reasonably tend to incite a child below the age of eighteen years to violence or depraved or immoral acts against the person. There is no uncertainty in the terms on the statute, all men are put on notice by the terms of the statute as to that material which is prohibited from being distributed to children under the age of eighteen years old. As Mr. Justice Frankfuter said in his dissenting opinion in *Winters v. New York*, 333 U.S. 507, 534-535:

> "Insofar as there is uncertainty, the uncertainty derives not from the terms of condemnation, but from

the application of a standard of conduct to the varying circumstances of different cases. The Due Process Clause does not preclude such fallibilities of judgment in the administration of justice by men. Our penal codes are loaded with prohibitions of conduct depending on ascertainment through fallible judges and juries of a man's intent or motive — on ascertainment, that is, from without of a man's inner thoughts, feelings and purposes. Of course a man runs the risk of having a jury of his peers misjudge him. Mr. Justice Holmes has given the conclusive answer to the suggestion that the Due Process Clause protects against such a hazard:

"* * * the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matters of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death." *Nash v. United States*, 229 U.S. 373, 377, 57 L. Ed. 1232, 1235, 33 S. Ct. 780. To which it is countered that such uncertainty not in the standard but in its application is not objectionable in legislation having a long history, but is inadmissible as to more recent laws. Is this not another way of saying that when new circumstances or new insights lead to new leglislation the Due Process Clause denies to legislatures the power to frame legislation with such regard for the subject matter as legislatures had in the past? When neither the Constitution nor legislation has formulated legal principles for courts, and they must pronounce them, they find it impossible to impose upon themselves such a duty of definiteness as this decision exacts from legislatures.

"The Court has been led into error, if I may respectfully suggest by confusing want of certainty as to the outcome of different prosecutions for similar conduct, with want of definiteness in what the law prohibits. * * *"

The statute in question was passed by the Maryland Legislature under the police power of the State which is sufficiently broad to cover and safeguard the peace and well being of the people. The statute violates no constitutional principle and prohibits acts which the State believes will bring evil to our children through the sale of publications containing that material which is prohibited by Section 421. See *Kovacs v. Cooper*, 336 U.S. 77, 93 L. Ed. 513, 69 S. Ct. 448. Many qualified persons through the years have stated their opinion as to the bad effect on children created by the reading of obscene and poronographic material which is circulated throughout the State and throughout the nation.

The Maryland Legislature passed the Act in question to shield juvenile innocence and to restrict this obscene material from our children.

The first prohibition of subsection (a) of Section 421 is an attempt by the Maryland Legislature to combat an evil which has been brought to their attention of the effect of publications which portray deeds of violent bloodshed, lust or immorality and which are so presented as reasonably to tend to incite a child below the age of eighteen years to depraved or immoral acts against the person. This prohibition gives fair notice of its ultimate effect as it furnishes an adequate standard of guilt, since the terms of the statute when defined within the framework of the community's current concept gives the statute sufficient definiteness to protect both society from the evils inherent in the dissemination of the prohibited material and also the rights of the persons who must meet the standards established by the statute.

The second prohibition of subsection (a) prohibits distribution of those materials which for a child below the

age of eighteen years are obscene, lewd, lascivious, filthy, indecent and disgusting and so presented to reasonably to tend to incite a child below the age of eighteen years to violence against the person. There is no question that the second prohibition regarding obscenity is constitutional as decided by the Supreme Court in the *Roth* case. As previously stated, the *Roth* case held that obscenity is not protected speech and Mr. Justice Brennan stated on page 1510 of 1 L. Ed. 2d:

> "It is argued that the statutes do not provide reasonably ascertainable standards of guilt and therefore violate the constitutional requirements of due process. Winters v. New York, 333 U.S. 507, 92 L. Ed. 840, 68 S. Ct. 665. The federal obscenity statute makes punishable the mailing of material that is 'obscene, lewd, lascivious, or filthy * * .* or other publication of an indecent character.' The California statute makes punishable, inter alia, the keeping for sale of advertising material that is 'obscene or indecent.' The thrust of the argument is that these words are not sufficiently precise because they do not mean the same thing to all people, all the time, everywhere."
>
> "* * * In summary, then, we hold that these statutes, applied according to the proper standard for judging obscenity, do not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited."

The Maryland statute prohibits material to be disseminated to children under the age of eighteen years if such material is obscene for that person. It is submitted that this terminology is definite and gives adequate notice of what is prohibited.

Subsection (b) of Section 421 makes it unlawful for any person operating any newstand, etc. to wilfully sell or distribute to any child below the age of eighteen years

> "* * * any book, pamphlet, magazine or other printed paper, specifically included, but not limited to comic books, devoted to the publication and exploitation of sex or of matter of an indecent character which for a child below the age of eighteen years is obscene, lewd, lascivious, filthy, indecent and disgusting or which are devoted to the publication and exploitation of actual or fictional acts of violent bloodshed, lust or immorality which are so presented as reasonably to tend to incite such child below the age of eighteen years to violent, depraved or immoral acts against the person."

Subsection (b), therefore, prohibits two types of materials to be sold to child under the age of eighteen years as did Subsection (a) and seems to be very similar. First, any material devoted to the publication and exploitation of sex or of a material of an indecent character which for a child under the age of eighteen years is obscene, lewd, lascivious, filthy, indecent or disgusting which are presented as reasonably to tend to incite such child below the age of eighteen years to violent, depraved or immoral acts. The main difference between Subsection (b) and Subsection (a) is that Subsection (b) is not limited to material principally composed of pictures and includes publications "devoted to the publication and exploitation of sex or material of indecent character."

The first prohibition of this Subsection would seem to fall in line with the *Roth* case and is also similar to the second prohibition of Subsection (a).

We respectfully request, for the above reasons, that this Honorable Court re-examine and reconsider this Court's decision in *Winters v. New York*, 333 U.S. 507, 92 L. Ed. 840, 68 S. Ct. 665.

CONCLUSION

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

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APPENDIX A

Constitution of Maryland
Declaration of Rights

Article 23:

"That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land."

Article 40:

"That the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege."

Annotated Code of Maryland (1957 Ed. and 1960 Supp.)

Article 27:

Section 421 (a) *Crime, etc., books prohibited.* — It shall be unlawful and an offense for any person operating any newsstand, book store, drugstore, market, or other mercantile establishment to wilfully sell or distribute to any child below the age of eighteen years, or permit the perusal of by any such child, or have in his possession with intent to sell, distribute or otherwise offer for sale or distribution to any such child, any book, pamphlet, magazine or other printed paper principally composed of pictures and specifically including but not limited to comic books, devoted to the publication and exploitation of actual or fictional deeds of violent bloodshed, lust or immorality, or which, for a child below the age of eighteen years, are obscene, lewd, lascivious, filthy, indecent or disgusting and so presented as reasonably to tend to incite a child below the age of eighteen years to violence or depraved or immoral acts against the person.

(b) *Sale, etc., of indecent, lewd, etc., publications to minors.* — It shall be unlawful and an offense for any person

operating any newsstand, book store, drugstore, market, or other mercantile establishment to wilfully sell or distribute to any child below the age of eighteen years, or permit the perusal of by any such child, or have in his possession with intent to sell, distribute or otherwise offer for sale to any such child any book, pamphlet, magazine or other printed paper, specifically including but not limited to comic books, devoted to the publication and exploitation of sex or of matter of an indecent character which, for a child below the age of eighteen years, is obscene, lewd, lascivious, filthy, indecent or disgusting or which are devoted to the publication and exploitation of actual or fictional deeds of violent bloodshed, lust, or immorality which are so presented as reasonably to tend to incite such child below the age of eighteen years to violence or depraved or immoral acts against the person.

(c) *Presumption as to employment.* — If any person shall be found violating the provisions of this subheading in or about any newsstand, book store, drugstore, market, or other mercantile establishment and shall be found to be an agent, officer, or employee of some other person who is actively engaged in the operation of such an establishment, these facts shall be presumptive evidence that the one found, violating the provisions of this subheading was doing so within the scope of his employment and within the course of his employer's business and with the knowledge of his employer; but it shall be competent for the defendant in any such case to rebut this presumption.

(d) *Exhibition of prohibited publications on streets, etc.* — It shall be unlawful and an offense for any person operating any newsstand, book store, drugstore, market, or other mercantile establishment to exhibit upon any public street or highway or in any other place within view of children below the age of eighteen years passing upon any such street or highway any book, pamphlet, magazine or other printed paper, prohibited and made unlawful by subsections (a) and (b) of this section.

(e) *Definition of "person."* — The word "person" as used in this subheading means any individual, firm, partnership association, corporation, company, or organization of any kind.

Section 423:

"This subheading shall not be construed to apply to those accounts of crime which are part of the ordinary and general dissemination of news appearing in publications which are published not less frequently than once a week, nor to such drawings and photographs as are used to illustrate such accounts."

Section 425:

"If any provision, section, subsection, sentence, clause or phrase of this subheading, or the application of same to any person of set circumstances, is for any reason held to be unconstitutional, void or invalid (or for any reason unenforceable), the validity of the remaining portions of this subheading or their application to other persons or sets of circumstances shall not be affected thereby, it being the intent of the General Assembly of Maryland in adopting this subheading that no portion thereof or provision or regulation contained herein shall become inoperative or fail by reason of any unconstitutionality or invalidity of any other portion, provision or regulation, and to this end, all provisions of this subheading are declared to be severable."

APPENDIX B

ORDER

In The
Superior Court of Baltimore City

Siegel Enterprises, Inc.

v.

Police Commissioner of Baltimore City, et al.

DECLARATORY JUDGMENT

(Filed January 27, 1960).

This cause having come up for hearing on the the Plaintiff's Amended Petition for Declaratory Judgment and Claim for Injunction, the Defendant's Answer thereto and a Stipulation of Facts entered into between the Plaintiff and Defendants, arguments of counsel having been heard and the cause having been considered, it is, this 27th day of January, 1960, by the Superior Court of Baltimore City, in acordance with the opinion filed herein, on January 19, 1960,

ORDERED, ADJUDGED AND DECREED:

(a) That Section 421 (a), (b) and (d) of Article 27 of the Annotated Code of Maryland, as amended by Chapter 197 of the Acts of 1959, is unconstitutional and void.

(b) That the Defendants be and they hereby are enjoined and restrained from enforcing said Section 421 (a), (b) and (d) of Article 27, as amended by Chapter 197 of the Acts of 1959.

(c) The Defendants shall pay the costs of this proceeding.

REUBEN OPPENHEIMER,
Judge.

OPINION OF

COURT OF APPEALS OF MARYLAND

(Filed July 1, 1960)

Police Commissioner of Baltimore City, et al.

v.

Siegel Enterprises, Inc., et al.

PRESCOTT, J.—

A large portion of the opinion of Judge Oppenheimer, who sat below, will be quoted and adopted as the major part of the opinion of this Court. Judge Oppenheimer stated:

"The plaintiff, the owner of two newsstands and bookstores in Baltimore, asks that the Crime Comic Books Act of Maryland (Code, 1957, Article 27, Sections 420-425, as amended by Chapter 197 of the Acts of 1959) be declared unconstitutional and that the defendants, charged with the enforcement of the criminal laws of this State in the City of Baltimore, be enjoined from enforcing that act. The stipulation filed in the proceedings shows that, if the act is constitutional, the plaintiff would be subject to prosecution under its provisions, and if found guilty would be punishable by fine or imprisonment not exceeding one year, or both. The petition is filed under the Uniform Declaratory Judgment Act, Code, 1957, Article 31A, which provides that any person whose rights are affected by a statute may have the court determine any question of its construction or validity. *Davis v. State*, 183 Md. 385.

"The act whose constitutionality is in issue is in the part of Article 27 of the Code entitled 'Obscene and Other Objectionable Publications'. Section 417 deals with the publication of a newspaper or other periodical which contains 'any obscene or licentious matter'. Sec-

tion 418 prohibits the sale, exhibition and advertisement of lewd, obscene and indecent books, magazines, newspapers and other publications. Section 419 prohibits the sale or exhibition to minors of publications principally made up of news or pictures of accounts of criminal news, or deeds of bloodshed, lust or crime; and Section 419B makes it unlawful to exhibit a motion picture film to a minor under the age of eighteen which, for such minor, would be obscene, indecent or criminal, or which would tend to corrupt the morals of such a minor. Section 419 was held unconstitutional in a decision of the Criminal Court of Baltimore City from which there was no appeal.[1] Neither the validity of that section nor the constitutionality of Sections 417, 418 and 419B is here in controversy.[2]

"Section 420 sets forth legislative findings and intent to the effect that children below the age of eighteen 'are or may be incited to commit certain crimes' in good part through the influence of the crime comic books of the kind referred to in the following section.[3] Subsection 421 (a) makes it unlawful to sell or distribute to or permit the perusal by any child below the age of eighteen years of age of any book, pamphlet, magazine or other printed paper principally comprised of pictures, including comic books, devoted to the publication and exploitation of actual or fictional deeds of violent bloodshed, lust or immorality or which, for a child below the age of eighteen, are obscene, lewd, lascivious, filthy, indecent or disgusting and so presented as reasonably to tend to incite such a child to violence or depraved or immoral acts against the person. Subsection (b) is similar in content and form, but is not limited to material principally composed of

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[1] *State v. Stien* (March 17, 1957), Byrnes, J. Judge Byrnes held Section 419 unconstitutional because of its vague and indefinite language on the authority of *Winters v. New York*, 333 U.S. 522.

[2] The plaintiff does not concede but does contest the validity of Sections 417 and 418.

[3] [This footnote contained the full text of Section 420.]

pictures and includes publications 'devoted to the publication and exploitation of sex or of matter of an indecent character'. Subsection (c) sets forth a presumption as to employment of the persons found violating the provisions of (a) and (b) and, of itself, is not here attacked. Subsection (d) makes it unlawful for any person operating a newsstand or book store to exhibit upon any public street or highway or in any other place within view of children below the age of eighteen passing upon such street or highway any of the books or publications referred to in subsections (a) and (b).[4]

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[4] Section 421, as amended in 1959, reads as follows:

"'Section 421. Sale, etc., of certain publications to minors prohibited.

"'(a) *Crime, etc., books prohibited.* — It shall be unlawful and an offense for any person operating any newsstand, book store, drugstore, market, or other mercantile establishment to wilfully sell or distribute to any child below the age of eighteen years, or permit the perusal of by any such child, or have in his possession with intent to sell, distribute or otherwise offer for sale or distribution to any such child, any book, pamphlet, magazine or other printed paper principally composed of pictures and specifically including but not limited to comic books, devoted to the publication and exploitation of actual or fictional deeds of violent bloodshed, lust or immorality, or which, for a child below the age of eighteen years, are obscene, lewd, lascivious, filthy, indecent or disgusting and so presented as reasonably to tend to incite a child below the age of eighteen years to violence or depraved or immoral acts against the person.

"'(b) *Sale, etc., of indecent, lewd, etc., publications to minors* — It shall be unlawful and an offense for any person operating any newsstand, book store, drugstore, market, or other mercantile establishment to wilfully sell or distribute to any child below the age of eighteen years, or permit the perusal of by any such child, or have in his possession with intent to sell, distribute or otherwise offer for sale to any such child any book, pamphlet, magazine or other printed paper, specifically including but not limited to comic books, devoted to the publication and exploitation of sex or of matter of an indecent character which, for a child below the age of eighteen years, is obscene, lewd, lascivious, filthy, indecent or disgusting or which are devoted to the publication and exploitation of actual or fictional deeds of violent bloodshed, lust, or immorality which are so presented as reasonably

"Section 423, entitled 'News account not included', reads as follows:

> "'This subheading shall not be construed to apply to those accounts of crime which are part of the ordinary and general dissemination of news appearing in publications which are published not less frequently than once a week, nor to such drawings and photographs as are used to illustrate such accounts.'"

"Section 425 contains severability provisions.

"The plaintiff contends that the Maryland act, particularly Section 421 (a), (b) and (d), constitutes an abridgment of the freedom of the press and a denial of due process of law and the equal protection of the laws under the First and Fourteenth Amendments to the Constitution of the United States and Articles 23 and 40 of the Declaration of Rights of Maryland. The State urges that the act constitutes a valid exercise of the police power to protect juveniles against objectionable and obscene material and to prevent crimes.

"Article 40 of the Maryland Declaration of Rights states that 'the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects being responsible for the abuse of that privilege'. Through the medium of the Fourteenth Amendment, the States as well as Congress are

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to tend to incite such child below the age of eighteen years to violence or depraved or immoral acts against the person.

* * * * * * *

"'(d) *Exhibition of prohibited publications on streets, etc.* — It shall be unlawful and an offense for any person operating any newsstand, book store, drugstore, market, or other mercantile establishment to exhibit upon any public street or highway or in any other place within view of children below the age of eighteen years passing upon any such street or highway any book, pamphlet, magazine or other printed paper, prohibited and made unlawful by subsections (a) and (b) of this section.'"

* * * * * * *

proscribed from enacting any laws abridging the freedom of speech or of the press. *Near v. Minnesota*, 283 U.S. 697, 707; *Baltimore v. A. S. Abell Co.*, 218 Md. 273, 284. That amendment exacts from the States all that is 'implicit in the concept of ordered liberty' basic to a free society. *Winters v. New York*, 333 U.S. 507; *Wolf v. Colorado*, 338 U.S. 25. The liberty of the press applies to pamphlets, magazines and periodicals as well as to newspapers. *Lovell v. Griffin*, 303 U.S. 444; *Howard Sports Daily, Inc. v. Public Service Commission*, 179 Md. 355, 361. It covers distribution as well as publication. *Winters v. New York, supra; Lovell v. Griffin, supra.*

"But the guarantees of free speech and of a free press, fundamental as they are, give no absolute protection for any utterance or publication. The liberties which the Constitution protects can exist only in a society strong enough to ensure the freedom of the individual. 'The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.' Holmes, J., *Schenck v. U.S.*, 249 U.S. 47, 52. The Smith act, making it unlawful to advocate or teach the overthrow of the government by force or violence, when intent is proved, does not violate the First Amendment. *Dennis v. U.S.*, 341 U.S. 494. Libellous statements are not within the area of constitutionally protected utterance. *Beauharnais v. Illinois*, 343 U.S. 250; *Negley v. Farrow*, 60 Md. 158. Nor is obscenity within the area of free speech and press upon which Congress and the States cannot infringe. *Roth v. United States*, 354 U.S. 476.

"The Due Process Clause of the Fourteenth Amendment protects persons under eighteen as well as adults. *Yick Wo v. Hopkins*, 118 U.S. 356. The right of young persons to read what they will, within the limits of permissible State or Federal action, is vital not only to them but to all our citizenry. The exclusion of obscenity from protected utterance does not carry with it the right to obscure from young or old facts or

events, however unpleasant, disturbing or violent.[5] It is through realization, in formative years, of the meaning of the ordered liberties protected by the Constitution that an adult citizenry is most apt to have the feelings and thoughts and to take the actions which are 'the real protection against attempts to strait-jacket the human mind.' Mr. Justice Frankfurter, concurring, *Dennis v. United States*, 341 U.S. 494, 556; see *Thornhill v. Alabama*, 310 U.S. 88, 95.

"Confluent with these principles is the right of a state to protect itself against crime. Protection against crime includes proper attempts to prevent it, and, as the statement of legislative findings which precedes Section 421 of the Maryland act shows, the endeavor to minimize juvenile delinquency was one of the operative causes in the passage of the legislation. There are limited areas in which state action may, under proper safeguards, encroach upon the constitutional guarantees, because of the greater interests of public order and safety involved. *Roth v. United States*, *supra*, 354 U.S. at page 484. The Assembly's declaration of the State's policy in these areas is to be regarded with the respect due the deliberations and actions of the legislative branch of our government. However, when a statute interferes with rights of free expression and publication, courts are under the duty to determine whether the interference, in the form it takes, is necessary to prevent encroachment upon more important interests. In this determination, if the act is an unconstitutional abridgment of the liberties guaranteed by the Fourteenth Amendment, it is immaterial that the encroachment was not intended or was enacted for other motives. *Baltimore v. A. S. Abell Co.*, *supra*, 218 Md. 273, 289; *National Association Ad-*

[5] "Before he was eighteen, while a student at King's College, Alexander Hamilton published a defense of the violent resistance to the British tax on tea. His 'Defense of the Destruction of the Tea', written at the age of seventeen, was his first contribution to the colonists' cause. Nathan Schachner, 'Alexander Hamilton', Chapter III.

vancement of Colored People v. Alabama, 357 U.S. 449. The issues presented in this case are to be adjudicated within the frame of these principles.

"In *Winters v. New York*, *supra*, the appellant was a New York City book dealer who had been convicted of a misdemeanor for having in his possession with intent to sell certain magazines charged to violate a New York statute. The statute forbade the publishing or display of 'any book' pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime.' The New York Court of Appeals, in affirming the conviction, construed the statute to be applicable only to 'publications that, besides meeting the other particulars of the statute, so massed their collection of pictures and stories of bloodshed and of lust as to become vehicles for inciting violent and depraved crimes against the person.' The Supreme Court held that this interpretation by the Court of Appeals 'put these words in the statute as definitely as if it had been so amended by the legislature'. The Supreme Court reversed the conviction, three justices dissenting.

"The majority opinion stated:

> "'We recognize the importance of the exercise of a state's police power to minimize all incentives to crime, particularly in the field of sanguinary or salacious publications with their stimulation of juvenile delinquency. * * *
>
> "'This Court goes far to uphold state statutes that deal with offenses, difficult to define, when they are not entwined with limitations on free expression. * * *'

"The Court found, however, the specification of publications prohibited from distribution too uncertain and indefinite to justify the conviction of the petitioner. The majority opinion said:

"'Even though all detective tales and treatises on criminology are not forbidden, and though publications made up of criminal deeds not characterized by bloodshed or lust are omitted from the interpretation of the Court of Appeals, we think fair use of collections of pictures and stories would be interdicted because of the utter impossibility of the actor or the trier to know where this new standard of guilt would draw the line between the allowable and the forbidden publications. * * *

"'The statute as construed by the Court of Appeals does not limit punishment to the indecent and obscene, as formerly understood. When stories of deeds of bloodshed, such as many in the accrued magazines, are massed so as to incite to violent crimes, the statute is violated. It does not seem to us that an honest distributor of publications could know when he might be held to have ignored such a prohibition. Collections of tales of war horrors, otherwise unexceptionable, might well be found to be 'massed' so as to become 'vehicles for inciting violent and depraved crimes.' Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained. *Herndon v. Lowry*, 301 U.S. 242, 259, 81 L. ed. 1066, 1075, 57 S. Ct. 732.'

"*Smith v. California*, 80 S. Ct. 215, 4 L. ed. 2d 205, held unconstitutional a Los Angeles ordinance imposing criminal responsibility on a book seller if an obscene book is found in his shop, even though there is no element of knowledge on his part.[6] In delivering

[6] "Subsections (a) and (b) of Section 421 of the Maryland Act require that the prohibited acts be done 'wilfully'. It was because of the absence of a scienter requirement in the California act that the statute was held unconstitutional. Subsection (d) of the Maryland act, dealing with the exhibition of the prohibited publications on or visible from streets, does not contain the word 'wilfully', but it refers to the publications made unlawful by subsections (a) and (b) whose display, under those subsections, must be wilful to be unlawful. Under

the opinion of the Court, Mr. Justice Brennan cited *Winters v. New York* as intimating that:

> "'* * * stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.'

"Both subsections (a) and (b) of Section 421 of the Maryland act, in my opinion, make the specification of publications prohibited from distribution as uncertain and indefinite as did the New York statute which the Supreme Court held unconstitutional in *Winter v. New York*. The New York statute, as interpreted by the New York Court of Appeals, was applicable to publications principally made up of criminal news or accounts of criminal deeds or stories of deeds of bloodshed, lust or crime, so massed as to become vehicles for inciting violent and depraved crimes against the person. The Maryland act includes, although it is not limited to, such publications; the standard as to all the publications it interdicts is that the material is 'so presented as reasonably to tend to incite a child below the age of eighteen years to violence or depraved or immoral acts against the person.' This is the same standard which the Supreme Court found so vague and indefinite that an honest distributor of publications could not know when he might be held to have ignored the prohibition.

"The defendants seek to distinguish the *Winters* case on the ground that, unlike the New York statute, the Maryland act includes publications which for one below eighteen are obscene, lewd, lascivious, filthy, indecent or disgusting. The same indefinite standard of

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ne principle of statutory construction that, where there can be two nterpretations, by one of which the act would be unconstitutional nd by the other valid, the latter construction is to be adopted. *licaźinski v. Landman*, 218 Md. 3, the provisions of subsection (d) ay be read as referring that the prohibited display must be wilful n testing its validity]."

reasonable incitement to violence or immoral acts applies to these publications as to those which, like the ones covered by the New York statute, deal with deeds or stories of bloodshed, lust or crime. Even though obscene publications, properly defined, may be interdicted, their inclusion with other publications within a periphery too vaguely drawn to provide fair ascertainable standards of guilt only enlarges the area within which innocent acts may be made criminal and the free dissemination of ideas adversely and unwarrantably affected.

"The Maryland act is limited to publications which tend to incite a person below eighteen years while the New York statute contains no such restriction, but both the majority and minority opinions in the *Winters* case recognize that a principal purpose of the New York statute was the protection of minors. The indefiniteness which the *Winters* decision held fatal goes to the nature of the prohibited publications and of the conduct which may be held to be criminal.

"The defendants contend further that subsection (b) of Section 421 differs from the New York statute because, in addition to other publications, it includes those devoted to the publication and exploitation of sex. Here again, the same indefinite standard applies. Moreover, as the Supreme Court pointed out in *Roth v. United States, supra*, sex and obscenity are not synonymous.[7] The term 'publication and exploitation of sex' injects another element of indefiniteness in an area in which freedom of speech and of the press are at stake. See Lockhart and McClure, 'Literature, The

[7] " 'Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.' *Roth v. United States*, 354 U.S. 476, 487.

Law of Obscenity, and the Constitution,' 38 Minn. L. Rev. 295.

"In his dissenting opinion in *Winters v. New York*, Mr. Justice Frankfurter included the Maryland act now codified as Article 27, Section 419, Code, 1957, as one of the statutes that fell by the decision. 333 U.S. at page 522. That section, which another Baltimore court has held unconstitutional,[8] contains virtually the same language as that of the New York statute, except that the prohibited sale, distribution and display is limited to minors. It does not contain the reasonable incitement standard of Section 421 which was passed after the *Winters* case. In that decision, the majority opinion held that the New York statute on its face, without the authoritative limitation of the Court of Appeals construction, would have been void because it included 'prohibition of acts fairly within the protection of a free press.' 333 U.S. at page 512. The interpretation of the New York Court of Appeals, held by the Supreme Court to have put the restrictive words in the statute to the same extent as if done by the Legislature itself, had only the limiting effect of the incitement standard of Section 421 (a) and (b) and that limitation, the Supreme Court held, was not sufficient to make the act constitutional.

"The constitutionality of the Washington comic book act was before the Supreme Court of that state in an action for a declaratory judgment. *Adams v. Hinkle*, 51 Wash. 2d 878, 322 P. 2d 844. While, unlike the Maryland act, the Washington statute made it a criminal offense to sell comic books without a license and so involved prior restraint, Section 7 and 9 made illegal the sale and display to minors under eighteen of comic books 'devoted to the publication or exploitation of fictional or actual deeds of violent bloodshed, lust, crime or immorality . . . so massed as reasonably to tend to incite minors to violence or depraved or im-

[8] See note 1, *supra*.

moral acts against the person.' No prior restraint was involved in these sections, the terms of which, as to standards, are closely similar to subsections (a) and (b) of Section 421 of the Maryland act. The Washington court passed upon all the constitutional questions involved and held the entire act, including Sections 7 and 9, unconstitutional. It held that those sections could not be differentiated from the act held invalid in *Winters v. New York*, and, under that decision, were so vague and indefinite as to violate procedural due process.

"Subsections (a) and (b) of Section 421 of the Maryland act, in my opinion, fall under the Supreme Court's condemnation of the New York statute in the *Winters* case; they fail to meet the due process requirements of Article 23 of the Maryland Declaration of Rights and of the Fourteenth Amendment in that they do not give fair notice of what acts will be punished, and permit within the scope of their language the punishment of acts protected by the principles of freedom of the press.

"Subsection (d) of Section 421 prohibits the display of any of the publications made unlawful by subsections (a) and (b) upon any public street or highway or in any other place within the view of children below the age of eighteen years. Unlike subsections (a) and (b), this subsection directly affects adults, for, under it, they are not permitted to see publications which as to them are unlawful.

"In *Butler v. Michigan*, 352 U.S. 380, the Supreme Court unanimously held unconstitutional a Michigan statute making it an offense to publish, sell or exhibit any publication containing obscene, immoral or lewd material tending to incite minors to violent or immoral acts. The Court said, at pages 383, 384:

> "'The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now

enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society.'

"The defendants contend that the display of books and other publications on the public streets and highways is under a privilege and not a right. The subsection goes beyond regulation of the public ways; it forbids the display of books and other publications in any place within the view of children under eighteen passing on a street. Under this language, a book seller is not permittted to show in the window of his own property a publication which he has the right to sell to any person over eighteen, and adults are not allowed to see the books which it is their right to buy and read. The arbitrary curtailment of constitutional liberties is clear.

"The subsection is invalid apart from this provision. The publications here involved concededly are ones which for adults are within the orbit of constitutionally protected freedoms. The maintenance of order, the preventation of riots, misuse, and littering of the public streets are necessary functions of governmental authority. But protection of the public peace and of the primary uses for which highways exist cannot be made a subterfuge for infringement of the basic constitutional rights which all our governments must preserve. Public interest in keeping clear the streets of the community cannot validate prohibiting the dissemination of information by handbills; an ordinance enacting such a prohibition was held unconstitutional as striking 'at the very foundation of the freedom of the press.' *Lovell v. Griffin, supra.* Preservation of the peace of public parks cannot serve as a cover for suppressing the orderly espousal of religious views. *Niemotko v. Maryland*, 340 U.S. 268. Sound trucks on streets are subject to reasonable regulation, *Kovacs v. Cooper*, 336 U.S. 77, but a requirement of permits for meetings on public grounds cannot be made a device for the sup-

pression of free expression. *Hague v. C.I.O.*, 307 U.S. 496.

"Kiosks and newsstands conceivably could be prohibited in an oblation to the snarls of traffic, but unless and until they are, the publications they display cannot be censored on the sole basis that public ground is occupied. In the Athenian Agora and the Roman Forum, on the London streets and colonial village greens, the public ways and gathering places, men learned the strength and wisdom of free discussion. Under our Constitution, the liberties of speech and press are not privileges but rights. It was the power of the licensor against which the struggle for the freedom of the press was primarily directed. Subsection (d) violates the rights of free speech protected by Article 40 of the Maryland Declaration of Rights and the Fourteenth Amendment to the Federal Constitution.

"By Section 423, the provisions of Section 421 are made inapplicable to accounts of crime which are part of the ordinary and general dissemination of news appearing in publications which are published not less frequently than once a week. Newspapers, therefore, are, [in general] exempt from the operation of law. The plaintiff contends that the classification is arbitrary, unreasonable and a violation of the Equal Protection Clause of the Fourteenth Amendment. The defendants urge that the State has the right and power to classify the subjects of legislation and that the classification is reasonable.

"The Washington comic book act held unconstitutional in *Adams v. Hinkle*, *supra*, contained a provision that no comic section of any regularly published daily or weekly newspaper shall be deemed to be a comic book for the purposes of the act. While the Court was unanimous in holding the act unconstitutional, there was a five to four division as to the validity of the exception. The majority, in holding the exemption unconstitutional, said, at 322 P. 2d 857, 858:

"'By section 3(4), comic sections of newspapers are exempted from license requirement. With commendable candor the attorney general, in argument at our bar, admitted that newspapers might print or publish anything found in any comic book without being subject to the restrictions imposed. Newspapers are entirely free of any restriction. Such discrimination is prohibited by Art. 1, section 12 of the Washington constitution which is:

> 'No law shall be passed granting to any citizen, class of citizen, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.'

and by the equal protection of the fourteenth amendment to the United States constitution.

"'The attorney general earnestly contends that this is a reasonable classification, and that the legislature has a right to classify if there be a rational basis for the classification. But this is not so when the equal protection clause is concerned with a right claimed under the first amendment.* * *

"'When the rights claimed are among those protected from legislative invasion by the first amendment, the equal protection clause of the fourteenth amendment assumes increased importance.'

"In *Katzev v. County of Los Angeles* (Cal. 1959), 341 P. 2d 310, the Supreme Court of California held the Los Angeles 'crime comic book' ordinance unconstitutional. That ordinance made it a misdemeanor to sell or exhibit certain publications to children under eighteen, and defined the prohibited publications with greater specificity than does the Maryland act. The Court held that the record failed to disclose a clear, causal connection between the substantive evil of juvenile delinquency and the circulation of crime comic books, but also held the ordinance invalid on

other grounds. One of the additional grounds upon which the ordinance was declared unconstitutional was a provision that it did not apply to those accounts of crime which appear in a newspaper of general circulation. The Court said, at 341 P. 2d 316:

> "'The ordinance denies distributors such as plaintiffs equal protection of the laws, since it establishes arbitrary and unreasonable exemptions.* * *
>
> "'Section 3b grants exemption to comic strips in newspapers, although these comic strips may not vary one iota from those appearing in the comic book media.
>
> "'Because these exemptions are unrelated to the purported purpose of the legislation, they impose an unfair burden on plaintiffs, thus denying them equal protection of the laws.* * *
>
> "'* * * the exemption provided for newspaper comic strips is without justification. Although a newspaper would be perfectly free to circulate a fictional portrayal of crime, a comic book which followed the frequent practice of reprinting newspaper comic strips would be banned. Unlike the exemptions for accounts of crime that are true or drawn from religious writings, this latter one is not based on content, nor is it a completely different form of presenting a story. Rather, the exemption is based solely on the nature of the product produced on paper. (Cf. Morey v. Doud, 354 U.S. 457, 466 et seq., 77 S. Ct. 1344, 1 L. Ed. 2d 1485.)'

"The Equal Protection Clause does not require that every state regulatory statute apply to all in the same business, but a statutory discrimination must be based on differences reasonably related to the purpose of the act in which it is found. *Morey v. Doud*, 354 U.S. 457. The exemption of newspapers from the scope of Section 421 of the Maryland act is broader than that con-

tained in Section 423. The latter section exempts those accounts of crime which are part of the ordinary and general dissemination of news appearing in publications published not less frequently than once a week, with illustrative drawings and photographs, but subsection (a) of Section 421, by its term applies only to publications 'principally' composed of pictures,' and subsection (b) applies only to publications 'devoted to the publication' of the prohibited material. The same material can appear with impunity in newspapers, whether in the form of news accounts, comic pages or drawings, which is forbidden in other forms of publications.

"Newspapers containing such material can be purchased by minors under eighteen as easily as the publications which, to them, are prohibited. If, as the Legislature has found, children under eighteen are or may be incited to commit crimes because of the presentation in collected form of actual or fictional deeds of violent bloodshed, it is difficult to see how the incitement is less when the deeds are recounted in the daily 'comic' or other pages of newspapers. The weekly 'comics' which are a feature of the modern paper are exempt because they are only one section of the paper in which they appear, even though the child may reach only for that section, but under the act it may be a criminal offense if some or all of the material of those sections is sold separately.

"Like the Due Process Clause, the Equal Protection Clause is here to be considered in connection with a law which has a potential inhibitory effect on the freedom of the press. *Winters v. New York, supra; Smith v. California, supra; Baltimore v. A. S. Abell Co., supra.* Under the Maryland act, some papers and magazines are singled out and held not entitled to the freedoms guaranteed by the Fourteenth Amendment and the Maryland Declaration of Rights. The test, under subsections (a) and (b), is whether the publication is 'principally composed' of or is 'devoted to' the material

which the Legislature has found may be injurious to persons under eighteen. The exempt publications may publish the same accounts of crime which appear in the publications subject to the act; their daily or weekly pages of 'comics' and 'adventures' may contain exactly the same strip drawings of fictional deeds of violent bloodshed which are shown in the banned 'comic books'. Indeed, the amount of the same kind of material in the daily or weekly press may be greater than that in some non-exempt publications, as long as the major portion of the paper consists of matter not within the scope of the act. Viewed in this aspect, the discrimination is not according to what is published but what is not published.

"Freedom of the press is directly affected as to one class of publication but not as to another, and the classification is made, not on the basis of material deemed objectionable, but the proportion of that material to other published matter. The classification, in my opinion, is unreasonable, and violates the Equal Protection Clause of the Fourteenth Amendment.

"The defendants ask that if any part of the statute is held unconstitutional, such portions as may be valid be sustained under the severability provisions of Section 425. They contend that, irrespective of the validity of other portions of the act, the prohibition regarding obscenity is clearly constitutional and should be upheld. As has been pointed out, it is clear that obscenity is not within the area of constitutionally protected speech or press. *Roth v. U.S., supra.* Statutes making the utterance or publication of obscenity an offense must give adequate warning of the conduct proscribed, but the terms need not be precise; the Constitution does not require impossible standards." In

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[9] "The standards in *Roth v. United States* and *Albert v. California*, 354 U.S. 476 were held adequate. See, however, *Kingsley International Pictures Corporation v. Regents*, 360 U.S. 684 and *Times Film Corporation v. City of Chicago*, 355 U.S. 35 reversing 244 F. 2d 432."

the present case, the standards relating to obscenity are inextricably mingled with the terms relating to other prohibited publications and the standards as to all prohibited publications are subject to the vagueness which was held to violate due process in the *Winters* case.

"The right of the Legislature to pass a statute specifically designed and properly framed to protect children against material obscene for them if not for adults[10] is not here in issue. In the act involved in this case, such a purpose was one of the legislative objectives, but the means employed to achieve it are the same as those used as to other conduct which the act proscribes, and it is those means which violate the constitutional guarantees. The Supreme Court, in *Winters v. New York*, and *Butler v. Michigan*, has fixed barriers of due process of law and freedom of the press which the Maryland statute clearly violates.

"These violations permeate the entire act. Subsections (a) and (b) fail to give fair notice of what conduct including but not limited to obscenity will be punished. Subsection (d) arbitrarily deprives the adults of Maryland of their constitutional liberties under the Maryland Declaration of Rights and the Fourteenth Amendment as to publications none of which the legislation, as to them, seeks to make illegal. The discriminations between classes of publications which are infringements of the Equal Protection Clause inhere in every provision of the statute.

"A severability clause does not constitute an absolute or inexorable command, it is merely an aid to interpretation. The test of severability is the effectiveness of an act, to carry out, without its invalid portions, the legislative intent, in enacting it. *Baltimore v. A. S. Abell Co.*, 218 Md. 273, 290; *Cromwell v. Jackson*, 188

[10] See *Butler v. Michigan*, 352 U. S. 380, 383 and *Adams v. Hinkle*, 322 P. 2d 844, 854. Cf. *Goldstein v. Commonwealth of Virginia*, 200 Va. 25, 104 S. E. 2d 69.

Md. 8, 28. The Legislature's power and intent to endeavor to minimize crimes among juveniles is not in question, but the invalidity of the means used to carry out that intent makes any permissible revision a matter for legislative, not judicial determination."

We will note in closing that this Court has recognized and applied the rule in regard to the definiteness required in criminal statutes, as laid down by the Supreme Court of the United States. Among the cases doing so, see *State v. Magaha*, 182 Md. 122, 125; *Blum, et al. v. Engelman*, 190 Md. 109, 113; *McGowan, et al. v. State*, 220 Md. 117, 125.

The decree passed below declared that Subsections (a) (b) and (d) of Section 421 of Article 27 of the Code (1959 Cum. Supp.) were unconstitutional and void; and enjoined the appellants from enforcing them.

For the reasons given above, the decree will be affirmed.

DECREE AFFIRMED, WITH COSTS.

FILE COPY

OFFICE SUPREME COURT, U.S.
FILED
OCT 27 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 450

(Filed September 28, 1960)

POLICE COMMISSIONER OF BALTIMORE CITY
AND
STATE'S ATTORNEY FOR BALTIMORE CITY
Petitioners

v.

SIEGEL ENTERPRISES, INC., t/a SIEGEL BOOK AND MAGAZINE STORE AND CHARLES BOOK CENTER,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF RESPONDENT IN OPPOSITION

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BRIEF OF RESPONDENT IN OPPOSITION

OPINION BELOW

The Opinion of the Court of Appeals of Maryland in the above-entitled case appears in 223 Md. 110, 162 A. 2d 727 and is printed in Appendix B of the Petition for Certiorari, page 19.

JURISDICTION

The Petitioners have invoked the jurisdiction of this Court under 28 U.S.C., Section 1257 (3).

REASONS FOR DENYING THE WRIT

On page 3, paragraphs 3 and 4 of the Petition for Certiorari, these statements appear:

> "The Court, in finding that the statutes involved were unconstitutional, primarily based such unconstitutionality on the case of *Winters v. New York*, 333 U.S. 507, 92 L. Ed. 840, 68 S. Ct. 665."
>
> * * * * * *
>
> and
>
> "The Maryland Court of Appeals based their opinion primarily on the case of *Winters v. New York*, 333 U.S. 507, 92 L. Ed. 840, 68 S. Ct. 665. This Petition is filed to respectfully request this Honorable Court to re-examine and reconsider that decision in light of conditions as they exist today."

The Court of Appeals of Maryland, adopting in toto the brilliant opinion of the Superior Court of Baltimore City (Reuben Oppenheimer, Judge) declared unconstitutional Section 421 (a) (b) and (d) of Article 27 of the Annotated Code of Maryland (1957 Ed. and 1960 Supp.), usually referred to as the Crime Comic Books Act and hereinafter called "the Act". (The Act is set out in full in Appendix A, pages 15-17 of the Petition for Certiorari). It is true Judge Oppenheimer carefully considered the *Winters* decision and relied upon it in part. However, other reasons for holding the Act unconstitutional are stated in his opinion, some of which are distinctly non-federal and one of which derives from a decision of this Court, namely *Butler v. Michigan*, 352 U.S. 380, that has no connection with *Winters*.

REASONS OF COURT OF APPEALS, APART FROM WINTERS, FOR HOLDING ACT UNCONSTITUTIONAL.

FIRST: The Act is offensive to Articles 23 and 40 of the Declaration of Rights of Maryland, which Articles are set out in Appendix A, page 15, of the Petition for Certiorari.

SECOND: The implicit exemption as to newspapers contained in Sections 421 (a) and (b) of the Act (Appendix A, pages 15 and 16 of the Petition for Certiorari) and the explicit exemption as to newspapers contained in Section 423 of the Act (Appendix A, page 17 of the Petition for Certiorari) are offensive to the Maryland Declaration of Rights, as well as to the Equal Protection Clause of the Constitution of the United States.

THIRD: As to the definiteness required in criminal statutes, the Court of Appeals of Maryland relied upon its own prior decisions, as well as the *Winters* case.

FOURTH: There is an element present in subsection (b) of Section 421 that was not present in the *Winters* case, namely, the banning of printed matter "devoted to the publication and exploitation of sex".

Accordingly, it will be seen at a glance that, even if *Winters*, a case that was argued three times before this Court, were reconsidered and reversed, there would nonetheless exist other compelling reasons why the Petition for Certiorari in this case should be denied.

THE ACT IS OFFENSIVE TO ARTICLES 23 AND 40 OF THE DECLARATION OF RIGHTS OF MARYLAND.

As to subsections (a) and (b) of the Act, Judge Oppenheimer stated:

> "Subsections (a) and (b) of Section 421 of the Maryland act, in my opinion, fall under the Supreme

> Court's condemnation of the New York statute in the *Winters* case; they fail to meet the due process requirement of *Article 23 of the Maryland Declaration of Rights* and of the Fourteenth Amendment in that they do not give fair notice of what acts will be punished, and permit within the scope of their language the punishment of acts protected by the principles of freedom of the press." (Emphasis supplied.) (Appendix B, page 30 of the Petition for Certiorari.)

Judge Oppenheimer held that subsection (d), which prohibits the display of any publications made unlawful by subsections (a) and (b) upon any public street or highway, or in any other place within the view of children below the age of eighteen, invalid in the light of *Butler v. Michigan*, supra (Appendix A, page 30, et seq. of the Petition for certiorari.) He also decided:

> "Subsection (d) violates the rights of free speech protected by *Article 40 of the Maryland Declaration of Rights* and the Fourteenth Amendment to the Federal Constitution." (Emphasis supplied.) (Appendix B, page 32 of the Petition for Certiorari.)

EXEMPTION AS TO NEWSPAPERS INFRINGES THE EQUAL PROTECTION CLAUSE.

Section 423 of the Act (Appendix A, page 17 of the Petition for Certiorari) provides:

> "This subheading shall not be construed to apply to those accounts of crime which are part of the ordinary and general dissemination of news, appearing in publications which are published not less frequently than once a week, nor to such drawings and photographs as are used to illustrate such accounts."

Apropos of this Section and the built-in exemption as to newspapers contained in Section 421, Judge Oppenheimer decided:

"The exemption of newspapers from the scope of Section 421 of the Maryland act is broader than that contained in Section 423. The latter section exempts those accounts of crime which are part of the ordinary and general dissemination of news appearing in publications published not less frequently than once a week, with illustrative drawings and photographs, but subsection (a) of Section 421, by its term applies only to publications 'principally composed of pictures,' and subsection (b) applies only to publications 'devoted to the publication' of the prohibited material. The same material can appear with impunity in newspapers, whether in the form of news accounts, comic pages or drawings, which is forbidden in other forms of publications.

"Newspapers containing such material can be purchased by minors under eighteen as easily as the publications which, to them, are prohibited. If, as the Legislature has found, children under eighteen are or may be incited to commit crimes because of the presentation in collected form of actual or fictional deeds of violent bloodshed, it is difficult to see how the incitement is less when the deeds are recounted in the daily 'comic' or other pages of newspapers. The weekly 'comics' which are a feature of the modern paper are exempt because they are only one section of the paper in which they appear, even though the child may reach only for that section, but under the act it may be a criminal offense if some or all of the material of those sections is sold separately.

"Like the Due Process Clause, the Equal Protection Clause is here to be considered in connection with a law which has a potential inhibitory effect on the freedom of the press. *Winters v. New York*, supra; *Smith v. California*, (80 S. Ct. 215, 4 L. Ed. 2d 205); *Baltimore v. A. S. Abell Co.*, (218 Md. 273). Under the Maryland act, some papers and magazines are singled out and held not entitled to the freedoms guaranteed by the Fourteenth Amendment and the *Maryland Declaration of Rights*. The test, under sub-

sections (a) and (b), is whether the publication is 'principally composed' of or is 'devoted to' the material which the Legislature has found may be injurious to persons under eighteen. The exempt publications may publish the same accounts of crime which appear in the publications subject to the act; their daily or weekly pages of 'comics' and 'adventures' may contain exactly the same strip drawings of fictional deeds of violent bloodshed which are shown in the banned 'comic books'. Indeed, the amount of the same kind of material in the daily or weekly press may be greater than that in some non-exempt publications, as long as the major portion of the paper consists of matter not within the scope of the act. Viewed in this aspect, the discrimination is not according to what is published but what is not published. (Emphasis supplied.)

"Freedom of the press is directly affected as to one class of publication but not as to another, and the classification is made, not on the basis of material deemed objectionable, but the proportion of that material to other published matter. The classification, in my opinion, is unreasonable, and violates the Equal Protection Clause of the Fourteenth Amendment." (Appendix B, pages 34-36 of Petition for Certiorari.)

A denial of equal protection transgresses not only the Fourteenth Amendment, but also Article 23 of the Maryland Declaration of Rights. *Sports Daily v. Public Service Commission*, 179 Md. 355, 358, 18 A. 2d 210; *Celanese Corporation v. Davis*, 186 Md. 463, 47 A. 2d 379.

Court of Appeals of Mary and Relied Upon Its Own Prior Decisions as to Definiteness Required in Criminal Statutes.

The Court of Appeals in its epilogue to Judge Oppenheimer's opinion based its decision as to the indefiniteness of the Act upon its own prior decisions, saying:

"We will note in closing that this Court has recognized and applied the rule in regard to the definite-

ness required in criminal statutes, as laid down by the Supreme Court of the United States. Among the cases doing so, see *State v. Magaha*, 182 Md. 122, 125; *Blum, et al. v. Engelman*, 190 Md. 109, 113; *McGowan, et al. v. State*, 220 Md. 117, 125." (Appendix B, page 38 of Petition for Certiorari.)

BANNING OF PRINTED MATTER "DEVOTED TO THE PUBLICATION AND EXPLOITATION OF SEX". (SUBSECTION (b) OF SECTION 421.)

This element was not present in the statute involved in *Winters*. Judge Oppenheimer held:

> "The defendants contend further that subsection (b) of Section 421 differs from the New York statute because, in addition to other publications, it includes those devoted to the publication and exploitation of sex. Here again, the same indefinite standard applies. Moreover, as the Supreme Court points out in *Roth v. United States*, supra, (354 U.S. 476), sex and obscenity are not synonymous. The term 'publication and exploitation of sex' injects another element of indefiniteness in an area in which freedom of speech and of the press are at stake. See Lockhart and McClure, 'Literature, the Law of Obscenity, and the Constitution', 38 Minn. L. Rev. 295." (Appendix B, pages 28 and 29 of the Petition for Certiorari.)

It might be observed that in neither of two out-of-state cases that Judge Oppenheimer referred to in holding the Maryland act unconstitutional, namely *Adams v. Hinkle*, 51 Wash. 2d 878, 322 P. 2d 844 and *Katzev v. County of Los Angeles*, 341 P. 2d 310, both of which banned crime comic books, and both of which were held unconstitutional, was a petition for certiorari filed in this Court. Probably because both cases had non-federal as well as federal bases.

MISCELLANEOUS

It is, of course, not contended by the Respondent that obscenity is entitled to constitutional protection. *Roth v. U.S.*, supra. The Act involved here is not an obscenity statute.

It will be observed that both subsection (a) and subsection (b) of Section 421 prohibit not only the selling of the banned material to children under eighteen, but also permitting "the perusal of by any such child" the banned material. This constitutes a subtle infringement of the rights guaranteed by the First Amendment and carried over by the Fourteenth Amendment against state action, in that a bookseller could have on his tables and shelves only books appropriate for children under eighteen. *Butler v. Michigan*, supra.

CONCLUSION

The *Winters* case has been law for twelve years. There would seem to be no reason for departing from that decision. However, as has been pointed out in this Brief in Opposition, the opinion of the Court of Appeals of Maryland in this case is based upon many considerations other than the *Winters* case. The invalidity of subsection (d) is predicated upon *Butler*, not *Winters*. No newspaper exemption was involved in *Winters*. The Court of Appeals found that the Act is inimical to the Maryland Declaration of Rights, as well as the Constitution of the United States.

This Court has consistently taken the position that it will not entertain jurisdiction of cases of this type if there was sufficient state ground for the decisions. *Black v. Cutter Laboratories*, 351 U.S. 292; *Wolfe v. North Carolina*, 4 L. Ed. 2d 1650, 80 S. Ct. 1482.

The Petition for Certiorari should be denied.

Respectfully submitted.

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